



SOUTHMAYD & MILLER

September 10, 2001

ORIGINAL  
EB 27

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VIA HAND DELIVERY

RECEIVED

SEP 10 2001

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Peninsula Communications, Inc.  
File No. EB 01-IH-0430  
NAL/Acct. No. 200132080060

Dear Ms. Salas;

Transmitted herewith on behalf of Peninsula Communications, Inc. is a declaration of Mr. David F. Becker, its president. The declaration is being submitted in response to the *Notice Of Apparent Liability For Forfeiture And Order*, FCC 01-242, released on or about August 29, 2001, and as referenced above. The signature page consists of a facsimile copy of the original, which will be supplied upon receipt.

Please contact the undersigned should you have any questions on this matter.

Very truly yours,  
Peninsula Communications, Inc.

By:

Jeffrey D. Southmayd

Its Attorney

Enclosure

Copies: Chairman Michael K. Powell  
Commissioner Kathleen Q. Abernathy  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin  
Enforcement Branch  
Service List U. S. Court of Appeals Case No. 01-1273

Federal Communications Commission

Docket No. 02-21 Exhibit No. EB#27

Presented by EB

Disposition { Identified 9-24-02  
Received 9-24-02  
Rejected \_\_\_\_\_

Reported E Thomas

Date 9-24-02

**DECLARATION OF DAVID F. BECKER  
PRESIDENT, PENINSULA COMMUNICATIONS, INC.**

I, David F. Becker, do hereby submit this Declaration in response to the "NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER" (hereafter the "Notice"), file No. EB 01-IH-0403, issued by the Federal Communications Commission, Washington, D.C. on or about August 29, 2001. The Notice was issued for the purpose of notifying Peninsula of the Commission's perception that it had violated Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301. Specifically, the Commission alleges that the "...violations arise from continued operation of translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; 272CN, Homer; and K274AB and K285AA, Kodiak, subsequent to our order to terminate such operations." The Commission proposes to fine Peninsula the sum of One Hundred and Forty Thousand Dollars (\$140,000.00) as a result of the alleged "illegal operation" of Peninsula's FM translator stations in these communities. The Notice requires Peninsula to "...submit an affidavit informing us whether Peninsula has ceased operating the above-captioned translators and whether it intends to operate those translators at any time in the future absent authorization to do so." This Declaration is submitted in response to the Commission's Notice. In summary, Peninsula believes that it is fully authorized to operate the subject FM translator stations (hereafter the "Translators") at the present time under the policies and rules of the Commission, and will continue to do so until such time as it is no longer authorized for such operation under the policies and rules of the Commission. In support of this disclosure, Peninsula respectfully submits the following for the consideration and review of the Commission.

It is undisputed that Peninsula was duly licensed to operate each of the Translators by the Commission and operated them with the full and undisputed consent and approval of the Commission until applications for the renewal of the licenses for the Translators were filed with the Commission in 1995. The basis for the present controversy between the Commission and Peninsula lies in the license renewal applications that were filed in a proper and timely manner in 1995, and subsequently re-filed in a proper and timely manner in 1997, in conformity with the Commission's rules and regulations. The subject proceeding is one involving license renewal applications for each of the Peninsula Translators. This is apparently a fact the Commission has lost sight of in issuing its Notice and suggesting that Peninsula's operation of the Translators violates the Communications Act and the Commission's rules and policies. It does not.

Section 1.62 of the Commission's Rules and Regulations, 47 C.F.R. 1.62, provides the procedures for the "Operation Pending Action on Renewal Applications" for broadcast stations. That rule provides as follows:

(a)(1) Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license with respect to any activity of a continuing nature, in accordance with the provisions of section 9(b) of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination which respect to the renewal application...

Section 73.3523(d)(2) of the Commission's Rules and Regulations, 47 C.F.R. 73.3523(d)(2), defines when a license renewal application is "pending" in the context of license renewal. That section provides:

(d)(2) An application shall be deemed to be pending before the Commission from the time an application is filed with the Commission until an order of the Commission granting or denying the application is no longer subject to reconsideration by the Commission or to review by any court.

Thus, under the Commission's broadcast license renewal rules and policy, a licensee is allowed to continue to operate its broadcast station within the context of a license renewal proceeding so long as the license renewal application remains subject to "...reconsideration by the Commission or to review by any court". This policy is effective no matter how heinous or otherwise outrageous the underlying conduct of the licensee may have been to warrant the denial of a license renewal application and/or the revocation of the license. *C.f. Contemporary Media, Inc. et. al. v. Federal Communications Commission*, 215 F.3d 187 (D.C. Cir. 2000) [licenses revoked due to licensee's sole owner and president being criminally convicted of sexually abusing children; licensee allowed to continue to operate stations through federal court appeal process].

While the Commission's Notice contains a fairly exhaustive recitation of the history of the regulatory proceeding involving the Translators, it unaccountably omits one quite important fact. The most recent orders in the Peninsula Translator proceeding, and those preceding them, are presently on review before the United States Court of Appeals for the District of Columbia Circuit. *See, Peninsula Communications, Inc. v. Federal Communications Commission*, Case No. 01-1273. The Commission is apparently aware of the pending nature of this action to review its orders in this proceeding since it has entered an appearance and is participating in the case. See Attachment A. Thus, Peninsula is at a loss to explain either the reason the Notice fails to mention the pending court proceeding, or to explain the erroneous conclusion in the Notice that it is operating the Translators that are the subject of court review "illegally."

In addition to the pending nature of the court appeal, the Translator proceeding may not be "final" at the present time in the context of the Commission's processes. On September 6, 2001, the United States Court of Appeals issued an *Order* in the *Peninsula* case, noting that the Commission's most recent decision, *Peninsula Communications, Inc.* FCC 01-159 (released May 18, 2001), required Peninsula to show cause why two of its translator licenses should not be modified. The Court raises the question whether this action by the Commission renders the entire action in the Peninsula proceeding non-final until such time as the show cause matter is finally resolved. Peninsula and the Commission have been directed to file pleadings on the matter in October.

These aspects of the Peninsula proceeding underscore the policy basis for allowing license renewal applicants to continue the operation of broadcast stations until such time as any proceedings on the matter are final and no longer subject to review. Moreover, as noted in the above-referenced rule regarding continued operation of stations during the processing of license renewal applications, the Administrative Procedure Act requires that all regulatory procedures be fully implemented and exhausted before an authorization is finally revoked and operating authority is terminated. This is crucially important in the context of broadcast licenses since the implementation of the 1996 amendments to the Communications Act of 1934, as amended.

Newly enacted Section 312(g) of the Communications Act, 47 U.S.C. 312(g) provides:

(g) Limitation on silent station authorizations. If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

In the case at hand, should Peninsula immediately cease operation of its Translators, and should the United States Court of Appeals thereupon vacate the Commission's orders in this proceeding more than 12 months thereafter, the licenses for the Translators would have ceased to exist, Peninsula would no longer have broadcast licenses for its Translators for the Commission to reinstate and upon which to grant the subject license renewal applications. Peninsula will not, and cannot, allow such a scenario to come to pass since it believes that it will ultimately prevail in its appeal.

It is undisputed that Peninsula has not been given "...notice and opportunity for a hearing..." in accordance with Section 309(e) of the Communications Act prior to the denial of the license renewal applications for its Translators. It is also undisputed that Peninsula has never been issued an order to show cause why its Translator licenses

should be modified or revoked in conformity with the requirements of Section 312(c) of the Communications Act. Therefore, because the Commission's various orders in this proceeding denying the license renewal applications and revoking the Translator licenses conflict with the clear statutory language of the Communications Act, Peninsula is confident the Court will ultimately vacate the orders and require the Commission to accord Peninsula the administrative due process to which it is entitled. *C. f. National Public Radio, Inc. V. Federal Communications Commission*, July 3, 2001, No. 00-1246 [application of auction procedures to noncommercial broadcast applications in conflict with Communications Act section 309(j)(2) requiring action to be vacated without the need for consideration of other arguments by appellants]. At that point, it is incumbent on Peninsula to ensure that the licenses for its Translators remain viable and in full force and effect. Peninsula intends to protect and defend the viability of its Translator licenses to the fullest extent of its ability.

In an attempt to "clear the air" in connection with Peninsula's continued operation of the Translators, and in spite of the clear mandate provided under the Commission's rules and policies for Peninsula to continue such operation while its license renewal applications remain pending, on February 23, 2000, Peninsula filed a motion to stay the effect of the January 2000 *Memorandum Opinion and Order* in this proceeding, 15 FCC Rcd 3293 (2000). To date, almost seventeen (17) months later, the Commission has failed to take any action on this motion for stay. I would renew the request for the Commission to stay its order pending the final determination of the Court of Appeals and/or the final determination of the Commission in this matter.

The Commission's Notice attempts to characterize Peninsula as a licensee who would intentionally and blatantly violate the Commission's rules and policies, and ignore a legitimate Commission order or mandate. This is unsupported by the record in this proceeding and Peninsula's record as a Commission broadcast licensee since 1979. Peninsula is a family-owned broadcasting company consisting of my wife, Eileen Becker, and myself. We have operated AM, FM and FM translator stations licensed by the Commission since we were first issued a license for KGTL-FM, Homer Alaska (now KWV-FM) in 1979. Over the course of the last 22 years, and up until the issuance of the Notice, Peninsula has never been cited by the Commission for any knowing violation of its rules and/or policies in connection with the operation of its broadcast stations. It has acted as a responsible and conscientious broadcast licensee of the Commission and will continue to do so. However, Peninsula will not sacrifice its statutory rights to continue to operate its duly licensed Translators under the duress and threat of an unwarranted and wholly inappropriate fine of \$140,000.00. I would ask the Commission to reconsider this action within the context of this Declaration and the facts contained herein, subject to my right to supplement those facts and this request for reconsideration.

I hereby declare, under penalty of perjury, that the facts contained herein, except those for which official notice may be taken, are true and correct to the best of my personal knowledge and belief.

Date: September 10, 2001

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David F. Becker, President  
Peninsula Communications, Inc.



I hereby declare, under penalty of perjury, that the facts contained herein, except those for which official notice may be taken, are true and correct to the best of my personal knowledge and belief.

Date: September 10, 2001

A handwritten signature in black ink, reading "David F. Becker". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

David F. Becker, President  
Peninsula Communications, Inc.

ATTACHMENT A

# United States Court of Appeals

District of Columbia Circuit  
Washington, D.C. 20001-2866

General Information  
(202) 216-7000

Facsimile Number  
(202) 219-8530

## ENTRY OF APPEARANCE

Case No. 01-1273

### CAPTION

PENINSULA COMMUNICATIONS, INC.,

v. Appellant,

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

### PARTY

The Clerk will enter my appearance as counsel for:

☐ Appellant(s)

☐ Petitioner(s)

\_\_\_\_\_  
Name of Party

☒ Appellee(s)

Federal Communications Commission

☐ Respondent(s)

\_\_\_\_\_  
Name of Party

☐ Intervenor(s)

\_\_\_\_\_  
Name of Party

☐ Amicus Curiae

\_\_\_\_\_  
Name of Party

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Gregory M. Christopher, Counsel

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Firm

Federal Communications Commission

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Washington, D.C. 20554

NOTE: Must be submitted by a member of the Bar of the USCA for the D.C. Circuit.